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# *Sullivan v. Scoular Grain Co.: Apportioning the Fault of Immune Employers*

## I. INTRODUCTION

The right of an employee injured at work to receive workers' compensation benefits under the Utah Workers' Compensation Act<sup>1</sup> represents a compromise between employees and employers.<sup>2</sup> The employee receives a predictable, though somewhat limited, recovery from the employer without the costly and time-consuming process of litigation ordinarily required to establish the employer's negligence,<sup>3</sup> while maintaining the right to bring suit against negligent third-parties.<sup>4</sup> The employer, in exchange for providing the insurance or benefits,<sup>5</sup>

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1. UTAH CODE ANN. §§ 35-1-1 to -107 (1988) (text of the Workers' Compensation Act).

2. *United Air Lines Transp. Corp. v. Industrial Comm'n*, 151 P.2d 591, 595 (Utah 1944); RAY J. DAVIS, UTAH WORKERS' COMPENSATION LAW 1-15 (1988); see also *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187, 1190 (Utah 1983) (employees and employers have rights and obligations under the Workers' Compensation Act).

3. UTAH CODE ANN. § 35-1-45 (1988) (injured employees "shall be paid compensation"); see FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 11.2 at 70, 75 (2d ed. 1986) (liability not based on fault; workers' compensation reduces court proceedings); 1 ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 2.10 (1993) (liability not based on negligence of employer or innocence of employee); Note, *Utah's Workers' Compensation and Occupational Disease Laws*, 1983 UTAH L. REV. 573, 575 [hereinafter *Utah's Workers' Compensation*] (Workers' Compensation Act helps avoid "expensive and time-consuming" litigation); see also *Baker v. Wycoff*, 79 P.2d 77, 85 (Utah 1938) (liability does not depend on the negligence of the employer); *Stokes v. Board of Review*, 832 P.2d 56, 62 (Utah Ct. App. 1992) (proof of fault not required in workers' compensation cases); *Large v. Industrial Comm'n*, 758 P.2d 954, 956 (Utah Ct. App. 1988) (workers' compensation system "excludes consideration of fault").

4. Concerning the right of an employee to sue third-parties, the Workers' Compensation Act provides the following:

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer . . . the injured employee . . . may claim compensation and the injured employee . . . may also have an action for damages against such third person.

UTAH CODE ANN. § 35-1-62 (1988).

5. Under the Workers' Compensation Act, an employer has three options for securing workers' compensation benefits for its employees: (1) "by insuring . . . with the Workers' Compensation Fund of Utah"; (2) "by insuring . . . with any stock corporation or mutual association authorized to transact the business of workers' compensation insurance in [Utah]"; or (3) "by furnishing annually to the

is guaranteed immunity from suit by the employee<sup>6</sup> and the right to reimbursement for any benefits paid to the employee if the employee recovers from third-parties.<sup>7</sup> This balancing of interests requires both employees and employers to give and take.<sup>8</sup>

In comparison with the Workers' Compensation Act, the Utah Liability Reform Act provides the method for determining and apportioning the fault of plaintiffs, defendants, and other parties in an action for personal injuries.<sup>9</sup> In essence, the Act provides that no person will be liable for more than his or her proportional share of fault.<sup>10</sup>

commission satisfactory proof of financial ability to pay direct compensation in the amount . . . provided for in this title." UTAH CODE ANN. § 35-1-46 (1988).

6. *Id.* § 35-1-60. This section of the Workers' Compensation Act provides that the compensation received by the employee "shall be the exclusive remedy against the employer . . . [and] shall be in place of any and all other civil liability whatsoever, . . . and no action at law may be maintained against an employer . . . based upon any accident, injury or death of an employee." This is known as the "exclusive remedy" provision of the Workers' Compensation Act. See *Dahl v. Kerbs Constr. Corp.*, 853 P.2d 887, 888 (Utah 1993) (employer immune from suit by employee); *Pate v. Marathon Steel Co.*, 777 P.2d 428, 431 (Utah 1989) (employer shielded by "exclusive remedy immunity" conferred by the Workers' Compensation Act); *Morrill v. J & M Constr. Co.*, 635 P.2d 88, 89 (Utah 1981) (workers' compensation is "exclusive vehicle for recovery").

7. With respect to the employer's reimbursement right, the Workers' Compensation Act provides the following:

If any recovery is obtained against such third person it shall be disbursed as follows: . . . (2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

UTAH CODE ANN. § 35-1-62 (1988).

8. See *DAVIS*, *supra* note 2, at 1-16 (employers and employees each have benefits and burdens under workers' compensation); *Utah's Workers' Compensation*, *supra* note 3, at 573-74 (employers and employees give up rights in exchange for benefits); see also *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187, 1190 (Utah 1983) (employees and employers each have "rights and obligations"); Workers' Compensation Fund of Utah's, *Amicus Curiae Brief in Support of Petition for Rehearing* at app. 12, *Sullivan v. Scoular Grain Co.*, 853 P.2d 877 (Utah 1993) (No. 910482) (workers' compensation is a "careful balancing" of rights).

9. UTAH CODE ANN. §§ 78-27-37 to -43 (1992) (text of the Liability Reform Act).

10. Sections 78-27-38 to 78-27-40 are the key sections of the Liability Reform Act. Section 78-27-38 defines "comparative negligence":

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

UTAH CODE ANN. § 78-27-38 (1992).

In *Sullivan v. Scoular Grain Co.*,<sup>11</sup> the Utah Supreme Court interpreted the Liability Reform Act in the context of an employee/third-party suit in which an employee had been injured at work as a result of the negligence of his employer and other third-parties.<sup>12</sup> The court concluded that the Liability Reform Act allowed the fault of the employer to be determined and apportioned, despite the employer's immunity under the Workers' Compensation Act.<sup>13</sup> To some, the court's decision disrupted the underlying principles of the Workers' Compensation Act by including the employer in the apportionment process and thereby limiting the recovery an employee will receive from third-parties.<sup>14</sup>

This Note examines the Utah Supreme Court's decision in *Sullivan*. Part II provides the background for the court's decision by briefly summarizing the development of comparative negligence in Utah in the context of the Workers' Compensation Act. Part III states the facts of the *Sullivan* case and presents the reasoning behind the court's decision. Part IV analyzes *Sullivan* in light of the plain language and legislative history of the Liability Reform Act. Finally, this Note concludes that the court misinterpreted the legislative intent of the Liability Reform Act and proposes a legislative solution to resolve the inequities resulting from the *Sullivan* decision.

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Section 78-27-39 contains the mechanism for determining and apportioning fault:

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

*Id.* § 78-27-39.

Section 78-27-40 provides the following:

Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

*Id.* § 78-27-40.

11. 853 P.2d 877 (Utah 1993).

12. *See id.* at 878.

13. *Id.* at 884; *see infra* text accompanying note 43.

14. *See Sullivan*, 853 P.2d at 885 (Stewart, J., dissenting); GOVERNOR'S TASK FORCE ON WORKERS' COMPENSATION, FINAL REPORT 18-19 (1993) [hereinafter GOVERNOR'S TASK FORCE]; Workers' Compensation Fund of Utah's, Amicus Curiae Brief in Support of Petition for Rehearing at 8, *Sullivan* (No. 910482); *see infra* note 111.

## II. BACKGROUND

In 1986, the Utah Legislature enacted the Liability Reform Act which modified the Comparative Negligence Act of 1973.<sup>15</sup> The Liability Reform Act dispensed with joint and several liability under the Comparative Negligence Act, but left intact the doctrine of comparative negligence.<sup>16</sup>

Prior to the Liability Reform Act, when an employee was injured at work as a result of the negligence of both the employer and a third party, the employer was not liable under joint and several liability for contribution to a third-party tortfeasor because the employers' "liability to the employee sprang from the Workmen's Compensation Act and not from tort law."<sup>17</sup> Therefore, since the employer was not liable for contribution based on joint and several liability, the third party "bore the risk of paying not only his or her share of the plaintiff's damages, but also the shares of [the employer and] other tortfeasors who were impecunious or immune from suit."<sup>18</sup>

The issue presented the court in *Sullivan* was whether under the Liability Reform Act the fault of immune employers should be determined and included in the apportionment process. To answer this question, the court analyzed the plain language and legislative history of the Act, and in addition

15. 1986 Utah Laws 199; *Sullivan*, 853 P.2d at 885 (Stewart, J., dissenting). For a general discussion of the Comparative Negligence Act of 1973, see E. Wayne Thode, *Comparative Negligence, Contribution Among Tort-Feasors, and the Effect of a Release—A Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406.

16. 1986 Utah Laws 199; *Sullivan*, 853 P.2d at 885 (Stewart, J., dissenting); see also Brad C. Betebenner, Comment, *The Liability Reform Act: An Approach to Equitable Application*, 1987 J. CONTEMP. L. 89, 91-97 (noting the effect of the abolishment of joint and several liability). The Liability Reform Act states that a plaintiff can "recover from any defendant or group of defendants whose fault exceeds his own." UTAH CODE ANN. § 78-27-38 (1992).

17. *Freund v. Utah Power & Light Co.*, 793 P.2d 362, 369 (Utah 1990) (an employer is "not liable for contribution to a third-party tortfeasor"); see also *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187, 1191-92 (Utah 1983) (employer cannot be joint tort-feasor); *Phillips v. Union Pac. R.R.*, 614 P.2d 153, 154 (Utah 1980) (employer cannot be joint tort-feasor); *Curtis v. Harmon Elec., Inc.*, 552 P.2d 117, 118 (Utah 1976) (employer cannot be a joint tort-feasor).

18. *Sullivan*, 853 P.2d at 882; see *Wollam v. Kennecott Corp.*, 663 F. Supp. 268, 274 n.9 (D. Utah 1987) ("[A]s a matter of law, [the third party] is the sole cause of 'liability' that could be paid to the plaintiff."); *Freund*, 793 P.2d at 369 (an employer is "not liable for contribution to a third-party tortfeasor"); Thode, *supra* note 15, at 419 & n.42 (defendant third party liable for non-parties); HENRY WOODS, *COMPARATIVE FAULT* § 13:13, at 272-73 & n.1 (2d ed. 1987) (employer not subject to contribution).

considered the equities of apportionment and how other jurisdictions apportion fault in employee/third-party actions.<sup>19</sup>

### III. SULLIVAN v. SCOULAR GRAIN CO.

#### A. *The Facts*

In October 1986, Scoular Grain Co., Freeport Center Associates, and Scoular Grain Co. of Utah (collectively "Scoular") employed Kenneth Sullivan to work at the Freeport Center in Clearfield, Utah.<sup>20</sup> The Freeport Center is a commercial grain storage facility comprising several rows of warehouses connected by railroad tracks.<sup>21</sup> At the Freeport Center, the Scoular employees are responsible for unloading the grain into the warehouses after its delivery by railroad.<sup>22</sup>

On October 17, 1986, Sullivan was monitoring the unloading of grain from a railroad car while standing between two empty cars.<sup>23</sup> Unknown to Sullivan, other loaded cars were being pushed down the track towards these empty cars.<sup>24</sup> When the cars crashed into one another, Sullivan was knocked to the ground and run over.<sup>25</sup> As a result of the accident, Sullivan lost his left arm and left leg.<sup>26</sup>

In 1987, Sullivan filed suit in the United States District Court for the District of Utah (the "trial court") against Scoular, Union Pacific Railroad, Denver & Rio Grande Western Railroad, Oregon Short Line Railroad, Utah Power & Light Co., Trackmobile, Inc., and G.W. Van Keppel Co.<sup>27</sup> alleging negligence; failure to train, instruct and warn; strict products liability and other causes of action.<sup>28</sup> In 1989, the trial court dismissed Scoular as a defendant after finding it immune from plaintiff's claim under the exclusive remedy provision of the Workers' Compensation Act.<sup>29</sup> The trial court also dismissed Denver & Rio Grande Western Railroad after finding it had no

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19. *Sullivan*, 853 P.2d at 878-84.

20. Brief for Petitioner Trackmobile, Inc. at 3-5, *Sullivan* (No. 910482).

21. *Id.* at 4.

22. *Id.* at 5.

23. *Id.* at 7.

24. *Id.*

25. *Id.* at 7-8.

26. *Id.* at 8; *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 878 (Utah 1993).

27. *Sullivan*, 853 P.2d at 878.

28. Brief for Petitioner Trackmobile, Inc. at 5-6, *Sullivan* (No. 910482).

29. *Sullivan*, 853 P.2d at 878. See *supra* note 6 for the text of the "exclusive remedy" provision.

legal duty to Sullivan.<sup>30</sup> Thereafter, defendant Trackmobile moved to have the jury determine and apportion the fault of all originally named defendants, including Scoular.<sup>31</sup>

The trial court found no Utah law controlling the allocation of fault of an immune employer,<sup>32</sup> and therefore certified the following question to the Utah Supreme Court:<sup>33</sup>

Under the Utah Comparative Fault Act, Utah Code Annot. § 78-27-38, et seq., can a jury apportion the fault of the plaintiff's employers that caused or contributed to the accident although said employers are immune from suit under Utah Workers' Compensation Act, Utah Code Ann. § 35-1-60, et seq.<sup>34</sup>

The Utah Supreme Court accepted the certification and concluded that a jury may determine and apportion the fault of employers despite their immunity from liability under the Workers' Compensation Act.<sup>35</sup>

### *B. The Reasoning of the Utah Supreme Court*

The Utah Supreme Court began its analysis of whether the fault of an immune employer may be determined and apportioned in an employee/third-party suit by noting an ambiguity

30. *Sullivan*, 853 P.2d at 878.

31. *Id.* at 879.

32. Brief for Petitioner Trackmobile, Inc. at 3, *Sullivan* (No. 910482).

33. Rule 41 of the Utah Rules of Appellate Procedure permits a court of the United States to certify a question to the Utah Supreme Court. The relevant portion of rule 41 provides the following:

(a) AUTHORIZATION TO ANSWER QUESTIONS OF LAW. The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.

UTAH R. APP. P. 41.

34. *Sullivan*, 853 P.2d at 878. As the court noted, the correct name for what the district court entitled the "Utah Comparative Fault Act" is the "Liability Reform Act." *Id.* at 878 n.1; 1986 Utah Laws 199.

35. *Sullivan*, 853 P.2d at 884. In addition to the question concerning immune employers, the court also accepted certification of a question outside the scope of this Note. That question asked whether "[u]nder the Utah Comparative Fault Act, Utah Code Ann. § 78-27-38, et seq., can a jury apportion the fault of an individual or entity that has been dismissed from the litigation but against whom it is claimed that they have caused or contributed to the accident." *Id.* at 878. The court concluded that "[a] jury may not apportion the fault of a party that has been dismissed from the lawsuit pursuant to an adjudication on the merits of the liability issue." *Id.* at 884.

in the Liability Reform Act caused by the Workers' Compensation Act.<sup>36</sup> The court found that because of the "exclusive remedy" provision of the Workers' Compensation Act,<sup>37</sup> the Liability Reform Act's definition of "defendant"<sup>38</sup> seemed to define "defendant" in such "a way that appear[ed] to preclude inclusion of an employer from apportionment."<sup>39</sup> However, the court noted that sections 78-27-38 and 78-27-40 of the Liability Reform Act seemed to indicate that the employer's fault should be included in the apportionment process.<sup>40</sup>

Since one section of the Liability Reform Act seemed to preclude inclusion of the employer's fault from apportionment, while other sections of the Act seemed to require it, the court concluded that it was "faced with two arguably contradictory statutes within the same article."<sup>41</sup> Thus, an ambiguity existed requiring "the court to make a policy inference as to the overall purpose and intent of the Act."<sup>42</sup>

The court concluded that the purpose and intent of the Liability Reform Act was to include immune employers in the apportionment process so that the remaining defendants were not liable in "excess of their proportion of fault."<sup>43</sup> In support of this conclusion, the court analyzed the legislative history of the Liability Reform Act and concluded that one of its main purposes was to abolish joint and several liability.<sup>44</sup> The court reasoned that if the immune employer is not included in the apportionment process "one of the major evils of joint and several liability would result" since third-parties would be liable for the fault of the immune employer.<sup>45</sup> In addition, the court found that the exclusive remedy provision of the Workers' Compensation Act "does not bar the [employer] from the apportion-

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36. *Id.* at 879-80.

37. *Id.* at 879; see *supra* note 6.

38. Defendant is defined as "any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery." UTAH CODE ANN. § 78-27-37(1) (1992).

39. *Sullivan*, 853 P.2d at 880.

40. *Id.* at 879-80. See *supra* note 10 for the text of sections 78-27-38 and 78-27-40.

41. *Sullivan*, 853 P.2d at 880.

42. *Id.*

43. *Id.*

44. *Id.*; see *infra* notes 104-105 and accompanying text.

45. *Sullivan*, 853 P.2d at 880.



ment process because apportionment is not an action at law and would not impose any civil liability on the [employer]."<sup>46</sup>

The court also noted three reasons why including the employer in the apportionment process would not prejudice the employer. First, the court reasoned that the employer has "a financial interest in the outcome of the [employee/third-party] action."<sup>47</sup> This interest arises because of the reimbursement provision of the Workers' Compensation Act which provides that the person liable<sup>48</sup> for compensation shall be reimbursed "for all payments made" if the employee recovers from a third party.<sup>49</sup>

Second, the Workers' Compensation Act provides that the employer or its insurer "shall" receive notice and have a reasonable opportunity to appear in an employee/third-party action.<sup>50</sup>

Third, under section 78-27-39 of the Liability Reform Act, a jury may determine and apportion the fault of a "person seeking recovery."<sup>51</sup> A "person seeking recovery" is defined as "any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative."<sup>52</sup> The court reasoned that because of the re-

46. *Id.* at 881.

47. *Id.*

48. Under the Workers' Compensation Act, an employer has three options for securing workers' compensation benefits for its employees: (1) "by insuring . . . with the Workers' Compensation Fund of Utah"; (2) "by insuring . . . with any stock corporation or mutual association authorized to transact the business of workers' compensation insurance in [Utah]"; or (3) "by furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount . . . provided for in this title." UTAH CODE ANN. § 35-1-46 (1988). Therefore, it is possible that the employer's insurer, and not the employer, will have paid the workers' compensation benefits and hence the insurer, and not the employer, will have the financial interest.

49. UTAH CODE ANN. § 35-1-62(2) (1988); see *supra* note 7 and accompanying text.

50. See *Sullivan*, 853 P.2d at 881. The relevant portion of section 35-1-62 of the Utah Code provides the following:

Before proceeding against the third party, the injured employee, or, in the case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

UTAH CODE ANN. § 35-1-62 (1988).

51. *Sullivan*, 853 P.2d at 881. See *infra* note 79 and accompanying text for full text of section 78-27-39.

52. UTAH CODE ANN. § 78-27-37(3) (1992).

imbursement provision of the Workers' Compensation Act,<sup>53</sup> the employer or its insurer "may be legitimately viewed as persons seeking recovery under the Act."<sup>54</sup>

In addition, the court looked to other jurisdictions and at the competing equitable interests of the parties to find support for its decision.<sup>55</sup> The court found that although "somewhat different statutes" were involved,<sup>56</sup> other states in the *Pacific Reporter* generally apportioned the fault of immune employers.<sup>57</sup> The court also noted that the Liability Reform Act had shifted the risk caused by "immune tort-feasors to the plaintiffs by abolishing joint and several liability."<sup>58</sup> Additionally, under general comparative negligence theory, the court found "it is accepted practice for the jury to apportion the comparative fault of all tortfeasors," including immune employers.<sup>59</sup> Accordingly, the court concluded that the "plaintiff's remedy on this point is a legislative one."<sup>60</sup>

#### IV. ANALYSIS

This case presented the court a complex set of statutory interpretation problems requiring a determination of how the legislature intended to apportion fault "when one of the parties whose negligence contributed to the plaintiff's injuries is immune from liability."<sup>61</sup> The problem this issue presented can be illustrated in the following hypothetical.

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53. *Id.* § 35-1-62; see *supra* note 7 and accompanying text.

54. *Sullivan*, 853 P.2d at 881.

55. *Id.* at 881-83.

56. *Id.* at 881.

57. In summarizing the apportionment rules of the various states in the *Pacific Reporter*, the court grouped the states into four categories: first, states that have expressly adopted the practice of apportioning the fault of immune employers (Arizona, Colorado, Kansas, New Mexico, and Washington); second, states that have interpreted their "general comparative negligence statutes to require apportionment of nonparty fault" (California, Hawaii, Idaho, Oklahoma, and Wyoming); third, states which "retain joint and several liability but allow the consideration of nonparty negligence for the limited purpose of determining whether all or none of the total fault can be attributed to the nonparty" (Alaska and Montana); and fourth, states which "refuse to allow a jury to consider the fault of nonparties in apportionment" (Nevada and Oregon). *Sullivan*, 853 P.2d at 881, app. 884-85 (Citations to the state codes are in the Appendix.).

58. *Id.* at 882; see Betebenner, *supra* note 16, at 94, 96.

59. *Sullivan*, 853 P.2d at 882-83.

60. *Id.* at 883.

61. *Id.* at 885 (Stewart, J., dissenting).

A. *Hypothetical*

Assume an employee is injured at work because of the negligence of the employer and a third party. A jury would find that the employer is sixty percent at fault,<sup>62</sup> and the third party is forty percent at fault. The jury would also find that the employee, who was without fault, sustained \$1,000,000 in damages.

The employee's exclusive remedy against the employer is determined by the Workers' Compensation Act.<sup>63</sup> Therefore, the employee will receive from the employer or its insurer<sup>64</sup> a statutorily determined amount of compensation based on the severity of the injury.<sup>65</sup> Assume that under the Workers' Compensation Act, the employee is entitled to \$300,000 in compensation.<sup>66</sup> The employee then sues the third party.

At trial, the third party requests that the fault of the employer be determined and included in the apportionment process.<sup>67</sup> Assuming the court denies the request, the third party

62. In this hypothetical and in the hypothetical appearing later in the Note, the employee is without fault. See *infra* notes 118-121 and accompanying text. While a completely faultless employee is unlikely, an innocent employee best illustrates the principles involved in this case and the impact of the court's decision on the employee's recovery.

63. UTAH CODE ANN. § 35-1-60 (1988); see *supra* note 6.

64. See *supra* note 48.

65. *Utah's Workers' Compensation*, *supra* note 3, at 606-614. Sections 35-1-64 to 35-1-81 of the Workers' Compensation Act set forth the amount of compensation received by an employee for an injury and the manner of its distribution. While the statutory amount of compensation provides some financial support for the injured employee, the amount of compensation received typically represents only a fraction of the employee's previous salary. For example, section 35-1-67 provides the compensation level for a permanent total disability. In part the section provides:

For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66 2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.

(b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependant spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children . . . .

UTAH CODE ANN. § 35-1-67(2) (1988). For more on the monetary inadequacies of workers' compensation, see HARPER, *supra* note 3, at 78-79.

66. As of December 1990, Sullivan had received over \$275,000 in workers' compensation benefits as a result of his accident. Reply Brief of Certified Respondent Kenneth Sullivan at 7, *Sullivan* (No. 910482).

67. In this hypothetical and in similar hypotheticals used by the majority and the dissent in *Sullivan*, the assumption is that regardless of the number of plain-

will be liable for \$1,000,000, rather than its actual proportional fault share of \$400,000.<sup>68</sup> Therefore, the employee will receive \$300,000 of workers' compensation and \$1,000,000 from the third party for a total of \$1,300,000. However, the \$1,000,000 received by the employee from the third party is subject to the reimbursement right of the employer or its insurer<sup>69</sup> who has paid \$300,000 to the employee.<sup>70</sup> The net result is the employee receives \$1,000,000, all of which has been paid by the third party which was responsible for only forty percent of the fault.<sup>71</sup>

However, if the employer's fault is included in the apportionment process, the third party will be liable for \$400,000 since the third party is only forty percent at fault.<sup>72</sup> Therefore, the employee will receive \$300,000 of workers' compensation and \$400,000 from the third party for a total of \$700,000. But again, the \$400,000 received by the employee from the third party is subject to the reimbursement right of the employer or its insurer.<sup>73</sup> The net result is the employee receives only \$400,000.

*B. The Duty of the Court is to Interpret the Statute  
in Light of Legislative Intent*

As this hypothetical demonstrates, whichever choice the court makes is unfair. If the employer is excluded from the apportionment process, the third party is liable for more than

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tiffs, defendants, or parties contributing to the injury of the employee, the jury must allocate 100% of the fault. *Sullivan*, 853 P.2d at 879, 886. As a result, if a party which contributed to the injury of the employee is not included in the special verdict as provided for in section 78-27-39 of the Liability Reform Act, the parties included in the special verdict will be responsible for the missing parties negligence since the jury must allocate 100% of the fault. The Utah Model Jury Instructions also provides for the allocation of 100% of the fault in this type of situation. MODEL UTAH JURY INSTRUCTIONS—CIVIL 36.2 (1993).

68.  $\$1,000,000 \times 40\%$  (the third-party's fault) = \$400,000. See UTAH CODE ANN. § 78-27-40 (1992) (defendant only liable for proportion of fault).

69. See *supra* note 48 and accompanying text.

70. See UTAH CODE ANN. § 35-1-62 (1988); see also *supra* note 7 and accompanying text; *infra* note 93 and accompanying text.

71. This would be the result under pre-Liability Reform Act cases since under joint and several liability, the employer was not liable for contribution. See *supra* notes 15-18 and accompanying text.

72. See UTAH CODE ANN. § 78-27-40 (1992) (defendant only liable for proportion of fault).

73. UTAH CODE ANN. § 35-1-62 (1988); see *supra* note 7 and accompanying text; *infra* note 93 and accompanying text.

its actual proportional fault share. But if the employer is included, the combination of the inclusion of the employer's fault in the apportionment process and the reimbursement right of the employer or its insurer will severely diminish the net damage award of the injured employee. In short, the court must choose between two evils.

Nevertheless, the court has a duty to interpret the statute as written by the Utah Legislature,<sup>74</sup> notwithstanding the decisions of other courts<sup>75</sup> in other jurisdictions.<sup>76</sup> In this case, the court misinterpreted the intent of the legislature with respect to the apportionment of fault of an immune employer. This misinterpretation can be seen from the plain language of the Liability Reform Act and the Act's legislative history.

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74. *Tygesen v. Magna Water Co.*, 226 P.2d 127, 131 (Utah 1950); *see also* *American Coal Co. v. Sandstrom*, 689 P.2d 1, 3 (Utah 1984) (court's primary responsibility is to "give effect to the intent of the legislature"); *Parson Asphalt Prods., Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980) ("over-arching principle" is that statutes be "construed and applied in accordance with the intent of the Legislature").

75. *See* *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 904 (Utah 1984). In *Jensen*, the court concluded that while the Utah Legislature had adopted part of the Utah Comparative Negligence Act of 1973 from a similar Wisconsin rule, the Legislature did not intend to adopt the Wisconsin interpretation of the statute. Under Wisconsin law, the negligence of each individual defendant in a multiple defendant case is compared against the negligence of the plaintiff to determine liability. The court rejected this interpretation and concluded that the total negligence of all defendants should be compared to the negligence of the plaintiff. *But see supra* notes 56-57 and accompanying text.

76. While the court's reference to how other states apportion fault in employee/third-party actions is helpful, the court fails to note significant differences in the employer's reimbursement right in some of those states. For example, in Kansas and New Mexico, the employer's recovery is diminished by the percentage of the employer's negligence. KAN. STAT. ANN. § 44-504(d) (1986); N.M. STAT. ANN. § 52-1-10.1 (Michie 1991); *see infra* note 112. In Oregon, Washington, and Wyoming, the employee receives a specific percentage of any damage award received from a third party regardless of the amount of compensation paid by the employer or insurer. OR. REV. STAT. § 656.593 (1991); WASH. REV. CODE ANN. § 51.24.060 (West 1990); WYO. STAT. § 27-14-105 (1991); *see infra* note 112. This information is significant because while some of these states apportion the employer's negligence, they temper the impact this would otherwise have on the employee's recovery by limiting in some way the employer's reimbursement. Thus, the result is less drastic than the result in *Sullivan*, in which the employer's negligence is apportioned and the employer or its insurer still receives full reimbursement.

1. *The plain language of the Liability Reform Act indicates immune employers are not to be included in the apportionment process*

The court in *Sullivan* stated "the best evidence of legislative intent is the plain language of the statute."<sup>77</sup> Sections 78-27-38 and 78-27-39 contain the key language of the Liability Reform Act. Section 78-27-38 defines "comparative negligence":

The *fault* of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose *fault* exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of *fault* attributable to that defendant.<sup>78</sup>

Section 78-27-39 contains the mechanism for determining and apportioning fault:

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of *fault* attributable to each *person seeking recovery* and to each *defendant*.<sup>79</sup>

Based on these sections of the Liability Reform Act, in order for the fault of the employer to be determined and apportioned by the jury the employer must be at "fault" and be either a "person seeking recovery" or a "defendant."

a. *Employers are not at "fault."* The Liability Reform Act defines "fault" as "any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery."<sup>80</sup> Therefore, in order for the employer's negligence to be apportioned according to section 78-27-39, the employer's "fault" must be an "actionable breach of legal duty."

When an employee suffers work-related injuries, the employee automatically receives compensation from the employer or its insurer<sup>81</sup> without a determination of the employer's

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77. *Sullivan v. Scouler Grain Co.*, 853 P.2d 877, 879 (Utah 1993); see also *Jensen*, 679 P.2d at 906 ("The best evidence of the true intent and purpose of the Legislature in enacting [an act] is the plain language of the [a]ct.").

78. UTAH CODE ANN. § 78-27-38 (1992) (emphasis added).

79. *Id.* § 78-27-39 (emphasis added).

80. *Id.* § 78-27-37(2).

81. Under the Workers' Compensation Act, an employee injured "by [an] acci-

fault,<sup>82</sup> and is also expressly barred from bringing suit against the employer based on the employer's negligence.<sup>83</sup> In essence, the right of the employee to receive workers' compensation benefits is based not on the "fault" of the employer, but rather on the employee/employer relationship.<sup>84</sup> Therefore, the immune employer's negligence, if any, is not an "actionable breach of legal duty" because the employee has no right to sue the employer.<sup>85</sup> Based on these considerations, the court incorrectly concluded that the jury may determine and apportion the "fault" of employers under the Liability Reform Act.<sup>86</sup>

*b. Employers are not "persons seeking recovery."* Section 78-27-37(3) of the Liability Reform Act defines a "person seeking recovery" as "any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative."<sup>87</sup> Such a person is subject to the comparative negligence provision of the Liability Reform Act which states that a person seeking recovery "may [only] recover from any defendant or group of defendants whose fault exceeds his own."<sup>88</sup>

Assuming, as did the court, that the employer may be viewed as a "person seeking recovery" because of the reim-

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ment arising out of and in the course of his employment, . . . shall be paid compensation for the loss sustained on account of the injury" by the employer or its insurer. *Id.* § 35-1-45 (emphasis added).

82. See HARPER, *supra* note 3, at 70; LARSON, *supra* note 3; see also *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923) (workers' compensation statutes impose liability regardless of act or omission by employer); *Stokes v. Board of Review*, 832 P.2d 56, 62 (Utah 1992) (proof of fault not required in workers' compensation cases); *Baker v. Wycoff*, 79 P.2d 77, 85 (Utah 1938) (liability does not depend on the negligence of the employer); *Salt Lake City v. Industrial Comm'n*, 74 P.2d 657, 658-59 (Utah 1937) ("[c]ompensation does not depend upon negligence"); *Large v. Industrial Comm'n*, 758 P.2d 954, 956 (Utah Ct. App. 1988) (workers' compensation system "excludes consideration of fault").

83. UTAH CODE ANN. § 35-1-60 (1988); see *supra* note 6 and accompanying text.

84. *Phillips v. Union Pac. R.R.*, 614 P.2d 153, 154 (Utah 1980); see also *Cudahy Packing*, 263 U.S. at 423 (liability based on relationship); *M-K Rivers v. Schleifman*, 599 P.2d 132, 134-35 (Alaska 1979) (liability based upon existence of employment relationship); *Bell v. Industrial Vangas, Inc.*, 637 P.2d 266, 272 (Cal. 1981) (liability based on relationship).

85. See *supra* note 6; see also *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 886 (Utah 1993) (Stewart, J., dissenting) (immune parties negligence is not actionable).

86. *Sullivan*, 853 P.2d at 884.

87. UTAH CODE ANN. § 78-27-37(3) (1992).

88. *Id.* § 78-27-38.

bursment provision of the Workers' Compensation Act,<sup>89</sup> the right of the employer or its insurer to reimbursement is then subject to the comparative negligence provision of the Liability Reform Act.<sup>90</sup> Thus, under the court's reasoning, when an employee injured at work sues a negligent third party, the employer or its insurer cannot seek reimbursement unless the employer's fault is less than that of the third party.<sup>91</sup>

However, this reasoning contradicts the reimbursement right contained in the Workers' Compensation Act.<sup>92</sup> Section 35-1-62 of the Act provides that "[i]f any recovery is obtained against [a] third person," the person liable for compensation payments "shall be reimbursed in full for all payments made."<sup>93</sup> This reimbursement right is not limited to when the fault of the employer is less than the fault of the third party.<sup>94</sup>

Therefore, the employer cannot be considered a "person seeking recovery" without limiting the reimbursement right of the employer or its insurer to situations in which the employer's fault is less than the fault of the third party. Such a

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89. *Sullivan*, 853 P.2d at 881; see *supra* notes 51-54 and accompanying text.

90. See Plaintiff Sullivan's Petition for Rehearing at 9-10, *Sullivan* (No. 910482).

91. See *id.*

92. UTAH CODE ANN. § 35-1-62 (1988).

93. *Id.* (emphasis added). The relevant portions of section 35-1-62 of the Utah Code provide as follows:

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

*Id.*

94. *Sullivan*, 853 P.2d at 883 (The reimbursement right "is not reduced in any respect by the amount by which the employer's act or omission contributed to the employee's injuries."); see UTAH CODE ANN. § 35-1-62 (1988) (This section does not restrict when the provider of the workers' compensation can seek reimbursement from a third party.).



definition would drastically alter the Workers' Compensation Act. It is unlikely this was the intent of the legislature.

c. *Employers are not "defendants."* Section 78-27-37(1) of the Liability Reform Act defines "defendant" as "any person not *immune* from suit who is claimed to be liable because of *fault* to any person seeking recovery."<sup>95</sup> This definition contains two elements. First, a defendant cannot be a person that is immune from suit. Second, a defendant must be claimed to be liable because of fault.<sup>96</sup>

As noted, the exclusive remedy provision of the Workers' Compensation Act grants the employer immunity from suit by an employee accidentally injured at work.<sup>97</sup> In addition, the employer's liability does not arise from the employer's "fault," but rather because of the employer/employee relationship.<sup>98</sup> Therefore, the employer is not a "defendant" under the Liability Reform Act.

2. *The legislative history of the Liability Reform Act shows the legislature did not intend immune employers to be included in the apportionment process*

Substitute Senate Bill No. 64, which ultimately became the Liability Reform Act,<sup>99</sup> initially provided in part:

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, *and to each other person whose fault contributed to the injury or damages.*<sup>100</sup>

However, before enactment the italicized phrase was omitted and the word "and" was inserted before "to each defen-

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95. UTAH CODE ANN. § 78-27-37(1) (1992) (emphasis added).

96. See Reply Brief of Certified Respondent Kenneth Sullivan at 6, *Sullivan* (No. 910482).

97. See *supra* notes 6, 81-86 and accompanying text.

98. See *supra* note 84 and accompanying text.

99. See 1986 Utah Laws 199.

100. Substitute S. 64, 46th Leg., Gen. Sess. § 3 (1986) (emphasis added). A copy of this bill can be found in the Brief of Certified Respondent Kenneth Sullivan at app. E, *Sullivan* (No. 910482).

dant."<sup>101</sup> The result is the present version of section 78-27-39.<sup>102</sup>

The court in *Sullivan* essentially ignored the omission of this phrase as evidence of legislative intent.<sup>103</sup> Instead, the court relied on a statement made by a senator during the floor debates concerning the bill and one part of the title<sup>104</sup> of the preliminary draft of the bill as evidence of legislative intent.<sup>105</sup> As noted by the dissent, the court dismissed the omission of this phrase "on the transparent ground that it is not clear why the language was deleted."<sup>106</sup>

One possible reason for the omission of this phrase is that the Legislature wanted to make clear that immune employers were not to be included in the apportionment process. If the phrase had been included in the bill, it could have caused confusion as to whether employers should be included in the apportionment process. However, left out, both the omission of the phrase and the definitions of "fault," "person seeking recovery," and "defendant" provide a "compelling piece of legislative

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101. Amendment to Substitute S. 64, 46th Leg., Gen. Sess. § 3 (1986) (State & Local Standing Comm.). A copy of the letter containing the recommendations of the Committee can be found in the Brief of Certified Respondent Kenneth Sullivan at app. F, *Sullivan* (No. 910482).

102. The current version of section 78-27-39 of the Utah Code provides the following:

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

UTAH CODE ANN. § 78-27-39 (1992).

103. See *Sullivan*, 853 P.2d at 880.

104. The full title of the preliminary draft of Senate Bill No. 64 states:

AN ACT RELATING TO THE JUDICIAL CODE; MODIFYING PROVISIONS RELATING TO COMPARATIVE NEGLIGENCE; SPECIFYING DUTIES OF JURORS AND JUDGES; ABOLISHING JOINT AND SEVERAL LIABILITY AND RIGHTS OF CONTRIBUTION AMONG DEFENDANTS; REQUIRING FAULT OF DEFENDANTS TO BE DETERMINED IN ONE TRIAL; AND DEFINING CERTAIN TERMS.

Substitute S. 64, 46th Leg., Gen. Sess. § 3 (1986). A copy of this bill can be found in the Brief of Certified Respondent Kenneth Sullivan at app. E, *Sullivan* (No. 910482).

105. *Sullivan*, 853 P.2d at 880. In *Kennecott Copper Corp. v. Anderson*, 514 P.2d 217, 219 (Utah 1973), the court stated that "it should be assumed that all of the words used in a statute were used advisedly and were intended to be given meaning and effect. For the same reasons, the omissions should likewise be taken note of and given effect."

106. *Sullivan*, 853 P.2d at 886 (Stewart, J., dissenting).

history"<sup>107</sup> that the legislature did not intend the fault of an immune employer to be included in the apportionment process.<sup>108</sup>

### C. A Possible Solution

In response to criticism by Justice Stewart in *Sullivan*,<sup>109</sup> Justice Durham stated in a later opinion that "[a]s the author of [*Sullivan*], I am not of the view that its result was necessarily 'good policy' . . . . I hope that the legislature will address the issue."<sup>110</sup> It is likely that the legislature will soon address the issue because of the court's conclusion in *Sullivan*.<sup>111</sup>

107. *Id.*

108. Assuming the legislature did not intend the fault of the employer to be included in the apportionment process, a question arises as to the meaning of section 78-27-40 of the Liability Reform Act which provides that the "maximum amount for which a defendant may be liable . . . is that percentage or proportion of damages equivalent to the percentage or proportion of fault attributed to that defendant." UTAH CODE ANN. § 78-27-40 (1992); see *supra* note 10. Recalling that the jury will apportion 100% of the fault among the parties on the special verdict as provided for in section 78-27-39, if the employer is not included on the special verdict the jury will simply apportion 100% of the fault among those parties on the special verdict. See *supra* notes 10 and 67. Therefore, the jury will apportion to some other party the negligence of the employer. See *Sullivan*, 853 P.2d at 886 (Stewart, J., dissenting). Thus, while it is true some parties will pay more than their negligence would require if the employer were included on the special verdict, no party will pay more than the proportion of fault attributed to them by the jury. This result is unfair to the party which was apportioned the negligence of the employer, but this was the result intended by the legislature. See *infra* note 111.

109. *Sullivan*, 853 P.2d at 885 (Stewart, J., dissenting).

110. *Brown v. Boyer-Washington Boulevard Ass'n*, 856 P.2d 352, 355 (Utah 1993) (Durham, J., concurring).

111. Following the court's decision in *Sullivan*, the Workers' Compensation Fund of Utah filed an amicus curiae brief in support of a petition for rehearing which was ultimately denied. Included within this brief were a number of affidavits written by Utah senators and representatives in office when the Liability Reform Act was passed. In general, these affidavits state that the legislature did not intend to affect the workers' compensation system with the passage of the Liability Reform Act. Workers' Compensation Fund of Utah's, Amicus Curiae Brief in Support of Petition for Rehearing at app. 7, 9, *Sullivan* (No. 910482). Additionally, former Senator Paul Rogers, a sponsor of the Liability Reform Act, stated:

I have read the Supreme Court of Utah's decision in [*Sullivan*]. The majority opinion therein determined a legislative intent contrary to my intent as a sponsor of the legislation and contrary to the intent of the Legislature. It was never the intent of the Legislature for the injured employee to bear the burden of the employer's conduct alone by having the third-party damages reduced by the employer's proportionate "fault" and then requiring the injured worker to reimburse the employer the full amount of the subrogation allowed by Section 35-1-62 U.C.A. of the Workers Compensation Act of Utah. Rather, the amendments which became a part of the Act were designed to make it clear that the employer's con-

One possible legislative solution is to allow the fault of the immune employer to be determined and apportioned, but to permit the employer or its insurer to be reimbursed only for the amount paid in workers' compensation benefits that exceeds the employer's proportional fault share.<sup>112</sup> Such a solution would require the alteration of both the Liability Reform Act and the Workers' Compensation Act.

With respect to the Liability Reform Act, the legislature would need to alter the definition of "fault" as well as the apportionment provisions of the Act. If the word "actionable" were removed from the definition of "fault" in section 78-27-37(2),<sup>113</sup> and the excluded portions of section 78-27-39 of Senate Bill No. 64 were reinserted into the Act,<sup>114</sup> the Liability Reform Act would then legitimately do what the *Sullivan* court did and allow for the determination and apportionment of the immune employer's fault.<sup>115</sup>

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duct was not to be compared to that of the injured employee and the defendant(s) in a civil lawsuit. The employer's responsibility for all their injured employees was provided for by their participation in the no-fault workers compensation system.

*Id.* at app. 8 (emphasis omitted); see GOVERNOR'S TASK FORCE, *supra* note 14, at 18-19 (recommending the legislature address the "potentially adverse effects of the *Sullivan* decision.").

112. Kansas and New Mexico have similar types of statutes. In Kansas, "the employer's subrogation interest or credits against future payments of compensation . . . shall be diminished by the percentage of the damage award attributed to the negligence of the employer." KAN. STAT. ANN. § 44-504(d) (1986). In New Mexico, "the employer's right to reimbursement from the proceeds of the worker's recovery in any action against any wrongdoer shall be diminished by the percentage of fault, if any, attributed to the employer." N.M. STAT. ANN. § 52-1-10.1 (Michie 1991). In Oregon, Washington, and Wyoming, the employee receives a specific percentage of any damage award received from a third party regardless of the amount of compensation paid by the employer or insurer. OR. REV. STAT. § 656.593 (1991) (employee gets at least one-third of the balance of the recovery); WASH. REV. CODE ANN. § 51.24.060 (West 1990) (employee gets at least twenty-five percent of the balance of the award); WYO. STAT. § 27-14-105 (1991) (employee gets at least two-thirds of the total proceeds).

113. Section 78-27-37(2) would read as follows:

"Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

114. See *supra* note 100 and accompanying text.

115. In addition to allowing for the determination and apportionment of fault of immune employers, these alterations of the Liability Reform Act would also permit the determination and apportionment of fault of other previously immune

Concerning the Workers' Compensation Act, the legislature would need to modify the reimbursement provision. This would require that subsection (2) of section 35-1-62<sup>116</sup> be replaced with a provision such as follows:

The person liable for compensation payments shall be reimbursed for all payments made in excess of the employer's proportional fault, less the proportionate share of costs and attorney's fees provided for in Subsection (1).<sup>117</sup>

The advantage of this proposal is that third-parties would be liable only for their proportional fault share, yet the employee's recovery from the third party would not be disproportionately reduced by both the inclusion of the employer's fault in the apportionment process and by the reimbursement provision of the Workers' Compensation Act. A hypothetical will best illustrate these principles.

Assume an employee is injured at work as a result of the negligence of the employer and a third party. A jury would find that the employer is twenty percent at fault, the third party eighty percent at fault, and that the employee, who was not at all at fault, sustained \$1,000,000 in damages.<sup>118</sup> Under the Workers' Compensation Act, the employee receives \$300,000 from the employer or its insurer. The employee then brings suit against the third party.

Assume further that the legislature has enacted the previously mentioned proposals<sup>119</sup> and that the fault of the employer is determined and apportioned. Thus, the third party is liable for \$800,000, which represents its eighty percent proportional fault share under the Liability Reform Act, and the employer or its insurer is liable for the \$300,000 based on the

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parties. The legislature would have to determine whether these alterations sweep too broadly and therefore require some limitations.

116. See *supra* note 93.

117. In addition to this provision, the Workers' Compensation Act would need to provide that the employer be included in, or agree to, any employee/third-party settlement. The purpose for this provision is to avoid litigation after an employee/third-party settlement to determine the amount of reimbursement to which the employer is entitled. Including the employer in any settlement agreement allows the employer to protect its reimbursement interest and make necessary provisions for reimbursement at the time of the settlement. See HAW. REV. STAT. § 386-8 (1985) (settlement requires written consent of both employer and employee); OR. REV. STAT. § 656.587 (1991) ("written approval of paying agency or, in the event of a dispute between the parties by order of the board").

118. See *supra* note 62.

119. See *supra* notes 112-117 and accompanying text.

Workers' Compensation Act. The employee receives a total of \$1,100,000.

However, the \$800,000 paid by the third party to the employee is subject to the reimbursement right of the employer or its insurer.<sup>120</sup> But the reimbursement right only allows reimbursement for the amount paid by the employer or its insurer in excess of the employer's proportional fault share.<sup>121</sup> In this case, since the employer was twenty percent at fault, the employer's proportional fault share is \$200,000. Therefore, the employer or its insurer can seek reimbursement only for the amount of compensation paid above \$200,000. In this case, the employer or its insurer is reimbursed by the employee for \$100,000.

The result is that the third party is liable for \$800,000, which represents its eighty percent proportional fault share under the Liability Reform Act; the employer or its insurer is liable for \$300,000 under the Workers' Compensation Act, but can seek \$100,000 in reimbursement from the \$800,000 received by the employee from the third party; and the employee receives \$1,000,000 in total compensation (\$800,000 from the third party and \$300,000 in workers' compensation, minus \$100,000 in reimbursement to the employer or its insurer). As can be seen, this proposal more fairly allocates the fault of the parties.

## V. CONCLUSION

In *Sullivan v. Scoular Grain Co.*,<sup>122</sup> the Utah Supreme Court misinterpreted the intent of the legislature with respect to the apportionment of fault of employers in an employee/third-party suit. The court's error can be seen in both the plain language of the Liability Reform Act and in the Act's legislative history. As a result of the court's decision, an employee's recovery from a negligent third party will be significantly reduced because of the inclusion of the employer's fault in the apportionment process and the reimbursement right of the employer or its insurer.

Because of the *Sullivan* decision, the legislature should act to correct the court's error. The best solution is to amend both

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120. See *supra* note 117 and accompanying text.

121. *Id.*

122. 853 P.2d 877 (Utah 1993).

the Liability Reform Act and the Workers' Compensation Act to allow for the determination and apportionment of the employer's fault, but to limit the reimbursement right of the employer or its insurer to the amount paid in excess of the employer's proportional fault share. By so doing, the legislature would more fairly allocate the fault of employers, employees, and third-parties.<sup>123</sup>

*Dale T. Hansen*

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123. Shortly before publication of this Note, the Utah Legislature altered the method of recovery and reimbursement in employee/third-party suits. In essence, the Legislature provided that the employer's fault in employee/third-party suits will always be apportioned by the jury. If the jury determines that the employer's fault is less than 40%, the trial court will reallocate the employer's fault among the other parties in proportion to the percentage of fault attributed to each party. However, if the employer's fault is determined to be equal to or greater than 40%, the employer's fault will be included in the apportionment process, but it will also be used to reduce the employer's reimbursement by the percentage of the employer's fault. Telephone Conversation with Dennis V. Lloyd, Vice President and General Counsel for the Workers' Compensation Fund of Utah (Mar. 9, 1994); see Substitute S. 224, Gen. Sess. (1994); *Top Business Issues in 1994 Session*, UTAH MANUFACTURERS ASS'N BULL., Mar. 1994, at 1.